No. 147

JUN 12 1940

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

JOHN R. LONGO,
Petitioner,

against

THE STATE OF NEW JERSEY,
Respondent.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF *CERTIORARI.*

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Supreme Court of the United States

OCTOBER TERM, 1939.

JOHN R. LONGO,
Petitioner,

against

THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*.

May it Please the Court:

The petition of John R. Longo respectfully shows to this Honorable Court:

A.

Summary Statement of Matters Involved.

1. Petitioner was indicted by the Hudson County (New Jersey) Grand Jury for an alleged violation of the New Jersey Election Laws (R. 2, 10), and on that indictment was brought to trial before a petit jury (R. 4, 10).

2. Prior to the commencement of the trial, *voir dire* examination was had of the prospective petit jurors (R. 2, 3, 13), four of whom testified falsely on that examination (R. 3, 13, 14, 15, 18, 22-30, 33-35).

3. By reason of that false testimony, it did not appear that any of those four jurors was subject to challenge for cause, nor that there was any reason or need for their

peremptory challenge, and accordingly none of those four prospective jurors was challenged. All of them sat as jurors in the trial, and participated in the verdict of guilty subsequently rendered against petitioner (R. 4, 10).

4. Subsequent investigation disclosed the falsity of said answers. Petitioner thereupon, after the rendition of the verdict of guilty, but prior to the pronouncement by the Trial Court of the judgment of conviction, presented to the Trial Court a verified petition for new trial, alleging, *inter alia,* the foregoing grounds (R. 4-5, 10-35).

5. In opposition to that petition, affidavits were filed on the part of the State of New Jersey (R. 36-50), including the affidavits of the four jurors in question (R. 41-42, 44, 47, 48-50). These affidavits did not contain a denial of the charge that the testimony on the *voir dire* was false. They in effect admitted the falsity in some particulars, and in other particulars failed to meet the charge. [1]

6. The petition for new trial was denied (R. 51), although the petition presented an uncontroverted case for its allowance. Application for *certiorari* to review that denial was made to the Chief Justice of the New Jersey Supreme Court, but was denied by him (R. 52). Similar application was made to the entire court, but was denied (R. 55). An appeal was thereupon taken to the New Jersey Court of Errors and Appeals (R. i).

6. Petitioner's contention was that each juror proved to have sworn and testified falsely on the *voir dire* exam-

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[1] See analysis of testimony in the brief, *infra,* under "Statement of the Case".

ination as to his fitness to serve on the trial jury, was thereby disqualified, and that by reason of the participation of those jurors in the trial, petitioner was deprived of liberty and property without due process of law, in violation of the Fifth Amendment, and was deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment, and was denied the equal protection of the laws, in violation of the Fourteenth Amendment, of the United States Constitution.

7. The claims of constitutional right were advanced in the petition for new trial (R. 20), in the application to the Chief Justice of the New Jersey Supreme Court for a writ of *certiorari* (R. 8, pars. H, I, J) [2], in the application to the New Jersey Supreme Court for a writ of *certiorari* (R. 8, pars. H, I, J) [2], and in the New Jersey Court of Errors and Appeals[3], the highest court of that state. The latter court affirmed the denial of the application for the writ, mention-

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[2] The affidavit in support of and constituting the application to the Chief Justice of the New Jersey Supreme Court was not required, under New Jersey practice, to be filed, in view of the denial of that application. The affidavit, re-sworn, was later presented to the entire Court, and was there filed. This is the affidavit appearing in the record below, pp. 2-51.

[3] Under New Jersey practice, the only ground for reversal is that "the Court below erred". Hence, no detailed specification of grounds appears in the Notice (R. i). That form of Notice preserves all the grounds of appeal previously urged. The appropriate section of the brief filed with the Court of Errors and Appeals is annexed hereto as an Appendix and shows that the constitutional questions were not abandoned.

ing in its opinion that a federal constitutional question had been raised.

8. The question is thus presented whether the above-enumerated rights, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, permit a defendant in a criminal proceeding to be tried by jurors who have sworn and testified falsely on their preliminary examination as to their fitness to serve.

B.

Reasons Relied on for Allowance of the Writ.

1. The New Jersey Court of Errors and Appeals has decided federal questions of substance not heretofore determined by this court, to wit: whether a state court may pronounce judgment of conviction in a criminal case in which trial jurors have testified falsely during a preliminary judicial inquiry into their fitness to serve as jurors:

(a) consistently with the due process clause of the Fifth Amendment.

(b) consistently with the due process clause of the Fourteenth Amendment; and

(c) consistently with the equal protection of the laws clause of the Fourteenth Amendment.

2. The Court decided the aforesaid federal questions of substance in a way probably not in accord with applicable decisions of this Court.

3. The case is one of peculiar gravity and general importance. Basic constitutional rights are suspended if by

false testimony persons who are biased and partial may be permitted to sit as jurors in criminal cases, and if verdicts of guilty rendered by such jurors may not, upon timely discovery of the falsity, be set aside.

C.

Prayer for Writ of Certiorari.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Court of Errors and Appeals of the State of New Jersey, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 52, October Term, 1939, *In the Matter of the Application of John R. Longo to the New Jersey Supreme Court for a Writ of Certiorari;* that said decree of said Court of Errors and Appeals be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

JOHN R. LONGO,
Petitioner.

By ABRAHAM J. ISSERMAN,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1939.

JOHN R. LONGO,
Petitioner,

against

THE STATE OF NEW JERSEY,
Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

I.

Opinions of the Courts Below.

The trial court wrote no opinion, but its order denying the new trial petition appears in the record at page 51. The Chief Justice of the New Jersey Supreme Court wrote no opinion, but his ruling appears in the record at page 52. The opinion of the New Jersey Supreme Court is reported in 122 N. J. L. 108 (see also, R. 53-54). The opinion of the New Jersey Court of Errors and Appeals is reported in 124 N. J. L. 176 (see also, R., supplement).

II.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (b) of the Judicial Code, and under Rule 38, paragraph 5 (a), of this Court.

The decree appealed from was entered on March 12, 1940 (R., supplement), and the foregoing petition is to be filed on June 12, 1940.

III.

Statement of the Case.

The charge on which petitioner was tried in the State Court was violation of the state election laws by the filing of an allegedly false nominating petition in Hudson County, New Jersey. Because of the nature of that charge, the prospective jurors were questioned as to their political affiliations, and as to their economic interests deriving from those affiliations. No objection was made on behalf of the State to that questioning. The jurors so questioned testified falsely, as is shown by the following analysis of the proofs submitted by both the petitioner and the State:

(a) As to *Arthur R. Flannery:* He denied that he was "related to any public officer" (R. 3). The moving affidavits alleged his uncle Edward Flannery, to be the holder of the elective public office in Hudson County of County Committeeman (R. 33), and his uncle Hubert Flannery to be a Jersey City Police Lieutenant (R. 23). Arthur R. Flannery's affidavit does not mention Uncle Edward at all, but presents the claim that this juror did not consider Uncle Hubert to be a "public officer" because his office was not elective (R. 47).

(b) As to *Edward McLaughlin:* He denied that he had "any relatives who are officers in this county" (R. 3). The moving affidavits showed that his

brother James McLaughlin, with whom he resided, had for five years held the elective office in Hudson County, of County Committeeman, and that his uncle John J. Gildae was a Jersey City Fire Captain (R. 25). His answering affidavit admits that his brother James held the aforesaid public office (R. 44).

(c) As to *Harry M. Asche:* He denied that he had "any relatives who are public officials of this city, or county" (R. 3). The moving affidavits showed that his brother-in-law Joseph Kennedy was a Jersey City Police Sergeant (R. 28). The answering affidavit admits the relationship and does not deny the public office held by Kennedy (R. 49).

(d) As to *David Morrisroe:* He claimed to be employed as a salesman for General Cigar Company, of First Street, New York City (R. 3). The moving affidavits showed that he was employed as a bartender at a tavern connected with a political organization (R. 24), that he had never been employed by General Cigar Company (R. 34), and that that company had never been located at First Street, New York City (R. 35). His answering affidavit does not deny any of those three facts, claims that he testified that the company was located at 41st Street, instead of First Street, and does not show that in fact the company was so located.

It was not argued below, nor is it here, that truthful answers to the questions, showing political or economic connections between the jurors involved and the political party

or faction opposed by petitioner, would necessarily have been ground for challenge for cause. Petitioner's contention was that the jurors were disqualified, not by those connections, but by their own act, their commission of false swearing in regard to the trial and in regard to their fitness to serve as jurors. Petitioner argued that the giving of false testimony in relation to the pending trial was repugnant to the basic concept of jurors and their position in criminal law.

The Court of Errors noted that petitioner by his appeal claimed

> "an invasion of his fundamental rights to a trial by an impartial jury both under the Federal and State Constitution."

but did not in its opinion otherwise refer to that claim.

The State Supreme Court had ruled that the proper method of review was by writ of error, and not by *certiorari*. The Court of Errors specifically refused to rule on this point, but proceeded to consider the meritorious question of fact originally raised by the application for new trial.

The conclusion of the Court of Errors was that the proofs in support of the application for a new trial were insufficient, that in any event they were amply controverted, and that the Trial Court had therefore not abused its discretionary power in refusing a new trial. The petitioner here contends that upon his uncontroverted proof, the Trial Court could not lawfully have denied a new trial and could not lawfully have pronounced judgment, since the verdict

of guilty was shown to have been rendered by an unlawfully-constituted jury.

ARGUMENT.

I.

The Procedure in the State Supreme Court Was Proper.

This point is treated because of the above-stated basis of the State Supreme Court's ruling.

It is fundamental that *certiorari* will lie to review all legal errors of a subordinate tribunal, where no other form of review is available.

> *5 R. C. L. 253, tit. "Certiorari"*, Sec. 5;
> *17 C. J. 16, tit. "Crim. Law"*, Sec. 3265, Notes 96-97;
> *Mellor* v. *Kaighn*, 89 N. J. L. 543;
> *N. J. R. & T. Co.* v. *Saydam*, 17 N. J. L. 25.

The New Jersey Court of Errors has ruled that the granting or denial of a new trial in a criminal case is not reviewable on writ of error.

> *State* v. *Hummer* (1906), 73 N. J. L. 714, 721;
> *State* v. *Pisaniello* (1915), 88 N. J. L. 262, 265;
> *State* v. *Fuersten* (1926), 103 N. J. L. 383, 390.

The New Jersey criminal practice provides for no other specially-stated method of review. Therefore, review of a prejudicial ruling on a new trial application may be had only by *certiorari*, and that is the proper remedy.

II.

The proofs below sustained the charge of false testifying: the holders of public elective offices, and members of city police and fire departments, are public officers.

We again refer this Court to the analysis of the proofs of false testifying. Further analysis of the testimony below will not be made, except as to the meaning of "public officer". It was urged below that three of the four jurors in question testified falsely to questions involving their connection with "public officers". That term has been defined as follows:

> "OFFICE
>
> "An 'office' is defined to be a public charge of employment, and he who performs the duties of the office is an officer.
>
> "The term 'office' in the constitutional sense, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws."
>
> "PUBLIC OFFICE. The right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public."
>
> "Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such times as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in

> the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." *Black's L. Dic.* (3rd Ed.), 1284, 1285.

The New Jersey Court of Errors and Appeals has held that even a notary public, by reason of the duties to be exercised by him for the general public, is a "public officer".

> *Kip* v. *Peoples Bank & Trust Co.*, 110 N. J. L. 178.

As for police officers, the New Jersey Supreme Court has held it to be ' well settled" that they are "public officers".

> *Speck* v. *Fairview*, 7 N. J. Mis. 410, (1929) *and cases therein cited.*

Under these decisions the County Committeemen related to Jurors Flannery and McLaughlin, the Police Lieutenant who was uncle to Juror Flannery, the Fire Captain who was uncle to Juror McLaughlin, the Police Sergeant who was brother-in-law to Juror Asche, were public officers.

III.

Petitioner was denied due process in that the verdict of his guilt was rendered by jurors who had testified falsely on *voir dire* examination, and who were thereby disqualified from rendering any verdict.

It is fundamental that when a prospective juror testifies falsely on examination as to his qualifications for jury service, he thereby automatically disqualifies himself.

16 C. J. 1159, tit. "Crim Law", Sec. 2665;
46 C. J. 94, tit. "New Trial", Sec. 51;
20 R. C. L. 242-3, tit. "New Trial", Sec. 27;
Knights of Pythias v. *Steele*, 107 Tenn. 1;
Hyman v. *Eames*, 41 Fed. 676;
State v. *Wright*, 112 Iowa 436;
State v. *Latham*, 124 La. 876;
Jones v. *State*, 97 Miss. 269;
State v. *Taylor*, 64 Mo. 358;
Spielter v. *No. German Lloyd*, 259 N. Y. S. 356, 232 App. Div. 104;
Romesbera v. *Merrill*, 99 Pa. Super. Ct. 197;
Pearcey v. *Michigan Mutual Life Ins. Co.*, 111 Ind. 59;
State v. *Lauth*, 46 Ore. 342;
Cupps v. *State*, 120 Wis. 504.

The disqualification appears, by the foregoing authorities, to rest upon the constitutional ground of impairment of the right to trial by an impartial jury, and impairment of the right to challenge, peremptorily or for cause.

This Court has held, in construing the meaning of "due process" under the Fifth Amendment that it requires that all rules of practice in impanelling a jury must necessarily be adapted to secure the rights of the accused.

Lewis v. *U. S.*, 146 U. S. 377,

and again, that it requires criminal trials to be had in accordance with the settled course of judicial proceedings.

Palko v. *State of Connecticut*, 302 U. S. 319.

While we find no ruling that the provisions of the *Fifth Amendment* apply to states, this Court has ruled that the *Fourteenth Amendment* has bound the states by the same requirements as were applied to the federal government by the earlier amendment.

Southwestern Oil Co. v. *Texas*, 217 U. S. 114.

We have found no New Jersey cases directly dealing with the effect of the above-discussed type of misconduct of a juror in criminal proceedings. Reference to the general body of law throughout the states, based upon well-established principles of jurisprudence, reveals an almost unanimous consensus in favor of the disqualification here urged. That disqualification was required, in accordance with "the settled course of judicial proceedings".

See, *Palko v. Connecticut, supra.*

IV.

Petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment.

The New Jersey Constitution guarantees that the right to trial by an impartial jury shall remain inviolate.

New Jersey Constitution, Article 1, Sections 6, 7. [4]

This provision permits unlimited challenges for cause.

The New Jersey statutes, in effect at the time of the trial below, allowed petitioner 10 peremptory challenges to the jury.

New Jersey Revised Statutes, 2:92-7. [4]

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[4] Quoted in full in Appendix 1, *infra.*

The indictment charged petitioner with having filed a false nominating petition in violation of the state election laws (R. 2, 10). The question, not of mere political affiliation, but of political connection resulting in such enonomic interest as would cause bias, was therefore of importance in respect to each juror. Petitioner was justified, at the time of the examination, in accepting the jurors' answer on this point as truthful. By their false answers the four jurors indicated that there was no occasion for challenge either peremptorily or for cause. The State Court's refusal, upon proof of the falsity, to rule that the jurors were disqualified, was therefore an impairment of petitioner's right to trial by jury, and an impairment of his right to challenge.

State v. *Lauth, supra;*
Jones v. *State, supra;*
State v. *Taylor, supra;*
Knights of Pythias v. *Steele, supra.*

Thus, the benefits and guarantees of the constitutional and statutory provisions above cited were not allowed to him, in violation of the guaranty of the equal protection of the laws, contained in the Fourteenth Amendment.

Conclusion.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that basic rights under the Constitution of the United States may be preserved, and accordingly that a writ of *certiorari* should be granted, and that this Court should review and reverse the decision of the Court of Errors and Appeals of the State of New Jersey.

Abraham J. Isserman,
Attorney for Petitioner.

APPENDIX 1.

New Jersey Constitution, Article 1.

Section 7. "The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men."

Section 8. "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed by the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of Counsel in his defence."

New Jersey Revised Statutes:

Section 2:92-7. "Upon the trial of any indictment where twenty or more peremptory challenges are not allowed, the defendant or defendants and the attorney general or the prosecutor of the pleas shall each be allowed peremptorily to challenge ten of the general panel of jurors summoned and returned by the sheriff or other officer."

APPENDIX 2.

(Reprint of Point Four as contained in the brief of John R. Longo, applicant-appellant, filed with the New Jersey Court of Errors and Appeals in support of his appeal, No. 52, October Term, 1939.)

POINT FOUR.

The making of false statements by jurors on the *voir dire* is ground for, and requires, a new trial. The Court erred in denying defendant's application.

It is of the very essence of the requirements of a juror, that he be honest and truthful. Wherever the question has been raised, it has been held that when a juror swears falsely in his examination as to his qualifications for jury service, that is ground for the allowance of a new trial.

> "The incompetency of a juror is ground for a new trial when discovered after verdict, where he denied the ground of his incompeter y on his *voir dire.*" 16 C. J. 1159, tit. "Crim. Law". Section 2665, and cases therein cited in note 5.
>
> "Where the falsity of a juror's testimony on his primary examination as to material matters is shown by competent evidence, a new trial should be granted at the motion of the losing party." 46 C. J. 94, tit. "New Trial", Section 51, and cases cited.
>
> "It is the general rule that if a juror deceives or misleads a party by falsely testifying when being examined as to his competency, and as a result the juror, though in fact disqualified is accepted, such conduct, when discovered after verdict, will be ground for a new trial and apparently no distinction

will be made between merely statutory disqualifications and those which affect the impartiality of the juror. Some courts indeed have declared that the constitutional right to an impartial jury would be infringed if a new trial were not granted where a juror testifies falsely as to his impartiality." 20 R. C. L. 242-3, tit. "New Trial", Section 27.

Spielter v. *No. German Lloyd,* 259 N. Y. S. 356, 232 App. Div. 104. (Concealment by juror of fact that his occupation was adjusting claims of the nature of the claim being tried.)

Romesbera v. *Merrill,* 99 Pa. Super. Ct. 197 (Intentional misleading by juror as to the fact of relationship.)

Williams v. *Bridges,* 35 P. (2) 407. (False denial by juror as to knowledge of the case.)

Rhodes v. *El Paso & S. W. Ry. Co.,* 248 S. W. 1064 (False denial of bias or prejudice warrants a new trial, even though it is not shown that the bias caused an unjust verdict.)

See, 50 L. R. A. (N. S.) 958-965, citing many dozens of authorities on this point.

The very phrase itself carried with it as an essential element the requirement of truth on the part of the juror.

"*Voir Dire L. Fr.* To speak the truth — This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc. is objected to." *Black, Law Dict.* 3rd Ed. p. 1822.

"*Voir Dire.* To speak the truth. The phrase refers to an oath administered to a proposed witness or juror, and also to the examination itself, to ascertain whether he possesses the required qualifications, he being sworn to make true answers to the

questions about to be asked him concerning the matter." 67 C. J. 270.

In

Pearcey v. *Michigan Mutual Life Ins. Co.*, 111 Ind. 59, 12 N. E. 98,

it was held that where a juror had falsely answered questions as to his taking out a policy with the insurance company involved, that was ground for a new trial, as being *misconduct of the jury impairing the right to challenge.*

The fundamental inequity of allowing a perjurer to influence or participate in judicial proceedings and deliberations goes to the very foundation of the requirement that jurors, being examined as to their qualifications, be truthful. The consideration of that principle is the basis of all the rulings above cited, just as it is the basis of the statutory provision that one convicted of perjury shall thereafter be incompetent as a witness.

See:

R. S. 19:34-26;
C. S. 1748, Section 18, rewritten as R. S. 2:157-1.

It goes to the very essence of the right to a fair trial by an impartial jury, as guaranteed by state and federal constitutions,

N. J. Const. Art. 1, Section 7-8;
U. S. Const. Amendments 5 and 6,

the rights guaranteed by *Article 1, Section 1* of the New Jersey Constitution, and the rights to due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.

JUL 19 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 147.

JOHN R. LONGO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari.

STATE'S BRIEF IN OPPOSITION.

DANIEL T. O'REGAN,
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Supreme Court of the United States

October Term, 1940

No. 147

JOHN R. LONGO,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari.

STATE'S BRIEF IN OPPOSITION.

(Note: All italics ours unless otherwise stated.)

The Facts.

John R. Longo was convicted in the Hudson County Court of Quarter Sessions upon an indictment which charged him with having violated Par. 434 of Chapter 187 P. L. 1930 (now Revised Statutes 19:34-2) pertaining to the New Jersey Election Laws. (See Appendix "A".)

He appealed by a strict writ of error to the New Jersey Supreme Court (See Appendix "B"), but the conviction was unanimously upheld. Cf. *State* v. *John R. Longo,* 121 N. J. Law 427; 3 Atl. Rep. (2nd) 127.

Simultaneously with the taking of this appeal, Longo applied to Part II of our Supreme Court for a writ of *certiorari* to review the denial by the trial judge of his

motion for a new trial. The motion was based upon affidavits (R. pp. 2 to 35) taken entirely *ex parte* and after the verdict was rendered. These affidavits alleged "false swearing" by certain of the jurors during their examinations on *voir dire*. The Supreme Court denied the application, *per curiam* (R. p. 53) stating "*We have examined the proofs submitted and deem the grounds upon which the writ is sought to be without merit.*"

This decision of the Supreme Court was thereupon appealed to the New Jersey Court of Errors and Appeals, which in turn unanimously affirmed the court below (Supp. to Record, p. 1). This court stated in its opinion (Supp. R. 8, l. 14), "*We have searched the record in vain for proper, legal proofs to support the tenuous claim made that some of the jurors swore falsely when examined upon their voir dire; it simply is not present.*"

The record before this Honorable Court is attenuated. The entire testimony of the *voire dire* examinations is not printed. All we have are *ex parte* affidavits of the defendant and certain persons taken after the trial and verdict. These persons were not witnesses at the trial and to this day, no opportunity was ever afforded the State for their cross examination. The affidavits themselves contain alleged quotations from counsel's examinations of the jurors (R., p. 3). These quotations are isolated questions and answers, removed from the complete text although the transcribed record has always been in counsel's possession. Without it, how can this court be asked to rule that the defendant was deprived of his constitutional rights?

Then again, there is still another factor in this case which must be noted: *Nowhere in the record, not even in the petitioner's affidavits, is there to be found the slightest*

contention of innocence of the crime for which he was convicted. Indeed, it could not be otherwise. Nevertheless, and despite the fact that his short term of confinement was concluded more than a year and a half ago, the net substance of his present application is to ask this court to rule upon the now mooted question of whether his procedure in the State Courts should have been by appeal or *certiorari.* Yet, both these courses were taken by him and ruled upon by our Courts! (Supp. Rec., p. 7, l. 12.)

It will be noted that the defendant's petition and brief deal exclusively with the alleged false swearing on the part of the jurors who sat in judgment. His entire case is thus founded upon a premise which our State's highest tribunals have unanimously found to be "without merit" and "simply non-existent".

The accused was tried and convicted upon an indictment which charged an offense against the laws of the State of New Jersey; he had a jury trial with full opportunity to investigate *before trial* the entire Master Panel of jurors from which was to be chosen the twelve persons who would sit in his case. (R., p. 36. See also opinion by Mr. Justice Perskie, Court of Errors and Appeals, and cases cited therein.) He had every opportunity to, and actually did examine upon their *voir dire,* the list of prospective jurors, exercise challenges, etc., until twelve persons *declared to be satisfactory to him* were finally chosen and sworn. He was deprived of no rights or privileges of whatever kind or nature and was fully heard on his own behalf.

Before proceeding with the State's principal argument, it might be well here to make reply to the points raised in the petitioner's brief.

1. "The Procedure in the State Supreme Court Was Proper." Here the point is attempted to be made that "*certiorari* will lie to review all legal errors of a subordinate tribunal, *where no other form of review is available*", and, "The New Jersey Court of Errors has ruled that the granting or denial of a new trial in a criminal case is not reviewable on writ of error."

This argument is utterly devoid of merit. The petitioner omits the all-important qualification that the granting or denial of a new trial in a criminal case is addressed to the sound discretion of the trial court, and no appeal will lie therefrom *unless the discretion is clearly abused. In re Longo, supra* (Record, p. 7, l. 26); *State* v. *Wood,* 23 N. J. Law 560, and cases cited in this opinion.

The law of New Jersey is long and firmly established that an appeal *will* lie from the exercise of judicial discretion, either on writ of error or by *certiorari,* where it has been clearly abused. *Labell* v. *Quasdorf,* 116 N. J. Law 368 (Ct. of Err. and App.), 184 Atl. Rep. 750; *Heuser* v. *Rothenberg,* 123 N. J. Law 319.

The petitioner has shown no abuse of discretion in the denial to him of a new trial. The *per curiam* opinion of our Supreme Court disposed of this question (Record, pp. 53-54) and again in the opinion of our highest court of appeals. (Supp. to Rec. at p. 1; at p. 7, ll. 12 and 29, *et seq.*) Longo has not nor does he now, deny his guilt, and therefor cannot claim to have been aggrieved by these rulings, nor to have suffered any manifest wrong or injury.

2. "The proofs below sustained the charge of false testifying", etc. There is nothing in the record to substantiate this baseless charge. No testimony is submitted to

support it, and the courts of New Jersey have adjudged this entire question to be "without merit" and "non-existent". This point is further developed under our "Point III".

Points III and IV of the petitioner's brief are answered herein under "Point I".

ARGUMENT.

POINT I.

Due process of law and equal protection of the law under State and Federal Constitutions were afforded to the petitioner at every stage of his trial and appeals in the Courts of New Jersey.

As already shown, petitioner was formally indicted for the violation of a state statute which in no sense is repugnant to the Federal Constitution; he was placed on trial before a court of competent jurisdiction with a jury lawfully constituted (Record, pp. 36 to 50 incl.). He had a public trial deliberately conducted, and an array of defense counsel outstanding for ability and reputation. He was found guilty after offering no real or meritorious defense, and was mildly sentenced to a very short term in the County Penitentiary. He appealed the conviction to Part I of our N. J. Supreme Court and at the same time applied to Part II of the same tribunal for a writ of *certiorari* to review the denial of his motion for a new trial. The appeal was dismissed (*State* v. *Longo,* 121 N. J. L. 427; 3 Atl. Rep. (2nd) 127), and the *certiorari* denied (R., pp. 53-54).

This latter ruling was then appealed to the highest court of our State, and, in a most carefully considered

opinion which delved deeply into the merits of the entire case, this appeal, too, was dismissed (Supp. to Record, p. 1).

No federal questions, therefore, are involved in this case.

It has repeatedly been held that the Supreme Court will not review irregularities or erroneous rulings by State Courts upon the trial, no matter how serious. *Frank* v. *Mangum,* 237 U. S. 309. Mr. Justice Pitney, in his opinion in this noted case, said: (p. 326)

> "As to the 'due process of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is "due process" in the constitutional sense. *Walker* v. *Sauvinet,* 92 U. S. 90, 93; 23 Law Ed. 678, 679; *Hurtado* v. *California,* 110 U. S. 516, 535, 28 Law. Ed. 232, 238, 4 Sup. Ct. Rep. 111, 292;" etc. etc. etc.

And again, at page 327:

> "And while the 14th Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston,* 153 U. S. 684, 687; *Andrews* v. *Swartz,* 156 U. S. 272, 275; *Rogers* v. *Peck,* 199 U. S. 425, 435; *Reetz* v. *Michigan,* 188 U. S. 505, 508), it is perfectly obvious that where such an appeal is provided for and the prisoner has

had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

Cf. *Snyder* v. *Commonwealth of Massachusetts,* 291 U. S. Rep. 97; *Palko* v. *Connecticut,* 302 U. S. 319, 329.

The State of New Jersey by express statutes (Appendix B) and rules of procedure, amply provides all the necessary judicial processes to correct or remedy any alleged wrongs or errors of law, and therefore this Honorable Court should not invoke its jurisdiction. Cf. *Mooney* v. *Holohan,* 294 U. S. 103, 79 L. ed. (Adv. 347), 55 S. Ct. 340.

POINT II.

The jurors were chosen with strict observance to the long and well established laws of the State of New Jersey, and petitioner had ample opportunity to investigate their relatives, character, occupations and general reputations.

For details concerning the choosing and publication of the list of petit jurors, see "Affidavit of George A. Senior", Jury Commissioner of Hudson County (Record, p. 36).

It is elementary, of course, that "the right to challenge prospective jurors is not a right of selection, but rather of exclusion." *State* v. *Langhans,* 95 N. J. L. 213; *U. S.* v. *Marchant,* 12 Wheaton 480.

Because of the publication of the Master Panel of 3,000 petit jurors months in advance of the trial, and further

publication of the *specific* panel of 204 petit jurors more than 10 days prior to the dates of their service, the law of New Jersey is well established that **"The defense in a criminal case is not entitled to ask questions of a juror called to the book, no challenge being interposed, for the purpose of eliciting information on which to base a peremptory challenge". *Clifford* v. *State*, 61 N. J. L. 217, 39 Atl. 721; *State* v. *Palmieri*, 93 N. J. L. 195, 107 Atl. 407.**

Following this well known rule of procedure, the defense, in the case at bar, interposed "challenges for cause" and thereupon proceeded to question the prospective jurors upon their *voir dire* as to bias and prejudice.

It is the settled law of New Jersey, followed by our courts for over 150 years, that *when a "challenge for cause" is interposed, the party challenging must state the cause and thereupon proceed to prove it.* The court alone tries the issue thus raised, and it may be proved by documents, statements, other witnesses and by the juror himself. *To disqualify the juror upon grounds of bias or prejudice, the court must find not only the existence of bias and prejudice, but that the bias or prejudice is founded or conceived in malice or ill will against the party challenging, and that the juror, no matter what the evidence at the trial, will disregard it to adjudge the defendant guilty.*

Clifford v. *State, supra;*
State v. *Fox*, 25 N. J. L. 565;
State v. *Zellers*, 7 N. J. L. 220;
State v. *Lammens*, 3 N. J. Law Journal 100;
State v. *Spencer*, 21 N. J. L. 196, at p. 199;
Moschel v. *State*, 53 N. J. L. 498;
State v. *Turco*, 99 N. J. L. 96;
State v. *Simmons*, 120 N. J. L. 85.

An examination of these cases compels us to conclude that even if the very facts now complained of, even if true (our courts have thrice found them to be untrue) and actually disclosed during the *voir dire* examinations, they still would not be sufficient to sustain the challenges for cause, because there was utterly no proof that the alleged "prejudice and bias" were conceived in malice or ill will toward the accused. The record in this respect is utterly barren, except insofar as counsel's argument is concerned. For the legal definition of "malice or ill will", see *State* v. *Fox, supra,* and *State* v. *Simmons, supra.*

As was held in the *Clifford* case, *supra:*

> "The accused had the benefit of the knowledge of what jurors have been called to serve at the trial, and is even served with the panel out of which the jurors who are to sit in his case are selected. His counsel were thus offered every opportunity to inquire in respect to the jurors and gain the information they required in order to intelligently act in making peremptory challenges."

See also *State* v. *Palmieri, supra.*

Obviously, petitioner did not avail himself of the opportunities which the law afforded him. He and his array of counsel could easily have investigated not only the jurors themselves, but their relatives as well. They did not do so. Instead, they asked a few, and incidently improper questions, of a most general nature, and expressed themselves as satisfied with the general answers they obtained.

> "An objection that there was a prejudicial discrepancy between the statements of prospective jurors and their subsequent testimony is too late

when made for the first time in the motion for a new trial." (16 Corpus Juris, p. 1160, Criminal Law.)

Not a single juror in this case can justly be charged with consciously or deliberately swearing falsely. Reference is respectfully made to their answering affidavits filed in the trial court on the original motion for a new trial. (Record, pp. 38 to 50 incl.)

POINT III.

The jurors did not swear falsely on their *voir dire* examinations, and in no sense were they disqualified from serving in this case.

The State most emphatically contends that not one of the jurors swore falsely on his *voir dire* examination. It will not serve any useful purpose here to reconcile in detail the facts disclosed during these *voir dire* examinations with those alleged to have been "discovered" after the rendition of the verdict, for the simple reason that the Record or State of Case fails to include any portion of the transcript of their evidence during the course of their examinations.

Suffice it to say that up to the time Juror No. 11, Harry Ashe (the last to be called), was accepted in the box, the defendant still had one or more peremptory challenges available. *State* v. *Drake,* 53 N. J. L. 23; *State* v. *Juliano,* 103 N. J. L. 663. Therefore, it cannot be said that the defendant suffered any manifest harm or injury.

If it was counsel's purpose to ask question in order "to intelligently exercise his right to peremptory challenges", rather than to sustain or prove the "challenge for cause",

then, of course, the examination was improper and the questions should have been excluded because the criminal procedure of our State does not permit such questioning for this purpose. *Clifford* v. *State, supra. Voir dire examinations are permitted only for the purpose of proving, or establishing, or sustaining challenges for cause stated to the Court.*

The very questions asked in the case *sub judice* were held improper by this court in *Connover* v. *United States,* 158 U. S. 408, 15 Sup. Ct. Rep. 951.

> "Questions to a juror as to his political affiliations are properly rejected in a trial for an election offense; and even the question whether the political affiliations or party predilections of the juror would tend to bias his judgment, should not be permitted in the absence of any special reason or ground therefor."

Applying the above rule to the matter *sub judice,* it may well be held that if these questions are improper as to the jurors themselves, how much more so must they be when they concern the uncles, brothers-in-law, cousins, etc., of the prospective jurors?

Some of the questions ruled out by this Court in the *Connover* case (*supra*) are:

> 3. Q. "Did you take an active part in the politics in the general election of November, A. D. 1890; and if so, with which of the parties did you affiliate and where?"
>
> 4. Q. "Have you been heretofore or are you now strongly partisan in your political beliefs?"
>
> 5. Q. "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?"

7. Q. "Were you ever at any time a judge or clerk of an election; and if so, when and where, and by what party were you named and appointed?"

8. Q. "Are you a member of any political club organized for the advancement of the interests of any political party; and if so, what party?"

Cf. *In re Spies* (*Spies* v. *Illinois*), 123 U. S. 131, and Sup. Ct. Rep. 21, 22; *Thiede* v. *Utah,* 159 U. S. 510, 16 Sup. Ct. Rep. 62, where it was also held that "Jurors, even where they have formed an opinion based upon newspaper articles, are not incompetent or disqualified when they state that they can lay aside any such opinions or impressions and try the case fairly and impartially upon the evidence presented."

That is just the situation here. *All* of the jurors so stated under oath and the record would clearly disclose this, if fully printed and submitted to this Honorable Court.

For example, page 62 of the transcribed minutes of the trial would show:

Questions by Mr. Marcantonio of juror David Morrisroe:

* * * * * * *

Q. "If it should develop at the trial that this defendant has different political views from your own, would that in any way prejudice you against him? A. No, sir."

Questions by Mr. Marcantonio of juror Harry Ashe:

* * * * * * *

Q. "Have you formed any opinions with regard to this case? A. No."

> Q. "If it develops at this trial that the political views of this defendant are not in accord with yours with regard to the present city administration in Jersey City and Hudson County, would that in any way prejudice you against the defendant? A. No, sir."

All of the jurors were similarly interrogated and all replied they would be guided in their judgment as to guilt and innocence solely by the evidence presented in open court.

Petitioner, John R. Longo, would seem to have it established as a matter of law, that he was entitled to a trial by a jury composed solely of his friends or persons of his own political faction, if indeed, such a faction actually existed.

Moreover, the objection to the jurors came much too late, and the whole case has already been ruled upon adversely to the petitioner by our Trial and Appellate Courts, all of which were legally and competently constituted and had full jurisdiction over the subject matter and the parties.

In *State* v. *Garzio,* 113 N. J. L. 349 (affirmed on appeal 116 N. J. L. 189) our courts ruled upon a very similar situation. There, a new trial was sought because it was alleged that one of the jurors swore falsely on *voir dire.* He was asked whether he knew a person mentioned in the indictment, and he answered "No". Testimony was taken on that point, *and the trial judge found as a fact* (as is the case here) *that the juror had not sworn falsely.* On appeal, the Supreme Court held:

> "Findings of fact by the Trial Judge on rules to show cause for a new trial based on an alleged

misconduct of the jury and attendants, and on an allegedly false answer by a juror to a question asked of him before he was accepted and sworn, will not be reviewed in error, where there was any evidence to support them".

The trial court in the case at bar fully considered the contents of the defendant's petition and the affidavits of the "investigators" *employed after the verdict.* He also had before him the answering affidavits filed by the State. He gave much time to counsel's oral arguments, and his rulings have been consistently upheld on appeal by unanimous votes of the appellate courts.

Unquestionably the findings of fact on this point by the appellate courts of our State, should be entirely dispositive of this baseless argument by the petitioner. Our Court of Errors and Appeals, the court of last resort in all causes, seems to have thoroughly gone into this whole question, and we respectfully submit that its unanimous findings should be left undisturbed. Two separate parts of our state Supreme Court have likewise ruled against Longo on his charges against the jurors. Under these circumstances, and following the established law, the Supreme Court of the United States should not now interfere.

POINT IV.

Petitioner having served his sentence is barred from further appeal, the case now being moot.

The judgment of conviction against John R. Longo carried a sentence of nine months in the Hudson County Penitentiary and thence until the costs were paid. *After serving*

this sentence, the appellant was discharged from custody on January 16th, 1939. A few days prior thereto the Hudson County Board of Freeholders, by a resolution, remitted the costs.

It has long been the settled rule of law in this jurisdiction as well as our Federal Courts, that appellate courts will not spend its time in deciding moot questions of law or fact or in entertaining appeals on moot cases. Cf. *In Re Lincoln,* 202 U. S. 178. In that case, Lincoln applied for a writ of *habeas corpus* after having been sentenced for transporting liquor onto an Indian Reservation. The sentence was sixty days in jail, plus a fine of $100. Mr. Justice Brewer, speaking for our United States Supreme Court, held:

> "Where petitioner's term of imprisonment has expired, but under the sentence he is still subject to confinement until a fine of $100.00 and costs has been paid, and nothing in the record shows whether such fine has been collected on execution, as authorized by the sentence, but if not collected or collectible, the petitioner can shortly be discharged on taking the poor debtor's oath, the case is practically a moot one, upon which the time of this court should not be spent."

So in the case at bar, Longo was tried and convicted. He served his sentence and was released more than a year and a half ago (Jan. 16, 1939). The whole case therefore has become moot, and it will not avail the appellant at this late date to have this Court now pass upon the question as to whether or not the New Jersey Courts erred in denying his application for a new trial.

Nor is petitioner's case aided in any way by the certainty of his guilt of the crime for which he was convicted. As has already been pointed out, nowhere does he assert his innocence of this State offense, and a new trial would therefore result in the same judgment of conviction. Under these circumstances alone, the Supreme Court of the United States should not now intervene.

Conclusion.

A careful examination of the petition and brief filed by the petitioner in this case will reveal that:

1. No substantial Federal question is involved in these proceedings or any phase thereof.

2. The defendant was lawfully indicted and convicted of a State offense and the conviction upheld by our appellate courts having competent jurisdiction on appeal.

3. Due process of law and the equal protection of the law were afforded to the petitioner throughout his trial and the appellate proceedings which followed.

4. All the constitutional privileges and immunities to which the petitioner was entitled were amply afforded him and his rights fully safe-guarded.

5. Petitioner has not shown that any of the jurors were incompetent or otherwise disqualified; or that they were biased and prejudiced against the defendant, or that such bias and prejudice were conceived in malice or ill will toward him; or that any of the jurors swore falsely upon their *voir dire* examinations.

6. The case presents only a moot question which this Court should not now consider.

7. There is nothing in this case which would warrant the intervention or jurisdiction of the Supreme Court of the United States under Section 237 (B) of the Judicial Code, or under Rule 38, par. 5(a) of this Court.

It is therefore respectfully submitted that in the exercise of its own sound judicial discretion, the Supreme Court of the United States should deny petitioner's application for a writ of *certiorari*.

The decision of the New Jersey Court of Errors and Appeals is in full accord with the applicable decisions of this Honorable Court and should not be disturbed.

Jersey City, N. J.
Dated: July 16, 1940.

Respectfully submitted,

DANIEL T. O'REGAN,
Prosecutor of the Pleas of the
County of Hudson,
Attorney for State of New Jersey.

ATWOOD C. WOLF,
Assistant Prosecutor of the Pleas,
Of Counsel.

Appendix "A".

Chapter 187, P. L. 1930, p. 878.

Par. 434, Sec. 2 (a) NOMINATION. No person shall falsely make, or make oath to, or fraudulently deface or fraudulently destroy any certificate of nomination or petition, or any part thereof, or file, or receive for filing, any certificate of nomination or petition, knowing the same or any part thereof to be falsely made, or suppress any certificate of nomination or petition which has been duly filed, or any part thereof. Every person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not more than five years.

Appendix "B".

New Jersey Statutes annotated. "Administration of Criminal Justice".—"Writs of Error".

2:195-1. Writs of Error in Criminal Cases; Issuance; Hearing and Determination of Writ of Right in Cases Punishable by Death

Writs of error in all criminal cases, not punishable with death, shall be writs of right and issue of course; in criminal cases, punishable with death, writs of error may issue as writs of grace out of the supreme court and be returnable thereto but only by order of the chancellor; if the chancellor shall refuse to order the issuance of such writ out of the supreme court, the defendant shall be entitled to a writ of error as a writ of right out of and returnable to the court of errors and appeals alone, and such writ shall be heard and determined at the term of said court next after the judgment of the court below, unless for good reasons the said court shall continue the cause to any subsequent term.

2:195-6. Persons Entitled to Writ of Error to Supreme Court

The attorney general or any prosecutor of the pleas, as the case may be, on behalf of the state, or any party, his legal representative, or other person damnified or aggrieved by any judgment rendered in the supreme court in any criminal case, may sue forth a writ of error to be directed to the justices of the supreme court, commanding them to cause the record of such judgment, and all things concerning the same, to be brought before the court of errors and appeals.

2:195-8. Annexation of Transcript to and Return of Writ

The party prosecuting a writ of error directed to any court of criminal jurisdiction shall, without delay, cause a transcript of the record to be made, and the justices or judges to whom the writ of error may be directed, or any one of them, shall annex such transcript to, and indorse a proper return on the writ of error, and return the same under his or their signatures.

If the plaintiff in error fails to procure the writ of error to be returned on the day to which it is made returnable, the writ shall be null and void, unless good cause be shown why it was not returned.

2:195-14. Bills of Exceptions; Contents; Settlement and Signing; Return with Writ

If, on the trial of any indictment, any exception shall be taken to any decision of the court during the trial to the prejudice or injury of any defendant, or if a general exception to the charge of the court to the jury be taken, the trial judge shall settle a bill of such exceptions, and sign and seal the same, so that the same may be returned with a writ of error to the court having cognizance thereof.

The bill of exceptions taken in any case shall contain only so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken at the trial, and the court or judge, upon the settlement of the bill, shall strike out of the same all the evidence and other matters which shall have been unnecessarily inserted.

2:195-16. Bringing up Entire Record; Consideration and Judgment in Appellate Court; Harmless Error; Fee

The entire record of the proceedings had upon the trial of any criminal cause may be returned by the plaintiff in error therein with the writ of error, bringing up the bill of

exceptions as signed and sealed in the cause; and on the argument such entire record shall be considered and adjudged by the appellate court. If it shall appear from such record that the plaintiff in error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, whether objection was made thereto or not, or in the charge of the court, or in the denial of any matter by the court which was a matter of discretion, whether a bill of exceptions was settled, signed and sealed thereto, or error assigned thereon, or not, the appellate court shall remedy such wrong or injury and give judgment accordingly, and order a new trial.

No judgment given upon any indictment shall, however, be reversed for any imperfection, omission, defect in, or lack of form, or for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits.

The fee to be paid for the entire record, when returned by the plaintiff in error, shall not exceed eight cents per folio, and, when requested in writing of the court, such record shall, by the court, be forthwith ordered for the plaintiff in error.

2:195-17. Assignments of Errors; Copy Served on Defendant in Error

The plaintiff in error shall assign and file errors, and serve a copy thereof on the defendant in error or his attorney, within thirty days after the return of the writ or be nonprossed, unless the court shall grant further time, and in such case the plaintiff in error shall assign and file errors within the further time so granted or be nonprossed.

2:195-18. Specification of Causes for Reversal, When Entire Record Taken Up; Copy Served on Defendant in Error

In all cases where the plaintiff in error shall elect to take up the entire record with his writ of error as authorized by section 2:195-16 of this title, he shall specify the causes in the record relied upon for relief or reversal, and shall not be confined to his bill of exceptions, or required to assign error thereon, and he shall serve a copy of the causes so relied upon for relief or reversal upon the attorney general or prosecutor of the pleas representing the defendant in error, at least ten days before the first day of the term at which the cause shall be heard.

2:195-19. Assignment of Error That Verdict Against Weight of Evidence; Reversal; New Trial

Whenever plaintiff in error in a criminal case elects to take up the entire record with his writ of error, he may assign as error that the verdict was against the weight of evidence, whether or not any exception has been taken or motion to acquit has been made; and, if it shall appear from a consideration of the entire evidence that the verdict was against the weight of the evidence, the appellate court shall reverse the verdict and award a new trial.

